

Judicial Enforcement of Economic, Social and Cultural Right

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Abstract

Economic, social and cultural right (“social right”) have historically been viewed as distinct in natyre and scope from civil and political right. Rather than being viewed as judicially enforceable rights of immeadiate application, such rights have widely been considered non-justiciable programmatic goals to be achieved progressively within available resources, through political processes. The purpose of this paper is to provide the legal and analytical tools to understand why this dichotomy is false.

The paper will consider the international normative framework for the legal protection of social rights, the specific content of state obligations under treaties dealing with such rights, how the international social rights monitoring system functions, and the various obstacles and opportunities currently facing the judicial enforceability of social rights.

In every society there is violation which implies its citizen not get proper social right, economical right and cultural right. Proper implementation and adoption of judicial enforcement can reduce this violation rate and established social peace. Step mentioned in the above might not perfect but it might be small starting and ensure social, culture & economical right for the people living in the society.

Keywords: economic right; social right; cultural right; judicial enforcement; international right

Introduction

The interest in promoting and protecting economic, social and cultural rights has grown and is increasing attention to the protection of these rights in the programmes and policies of governements and Non-governmental organizations. But the denial of economic, social and cultural rights continues and is even intensifying, in wealthy and poor countries alike.

The relative neglect of these rights on the human rights agenda has fostered a host of misunderstandings and misconceptions about them.

Economic, social and cultural rights are those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food,

water, health care and education¹. Although economic, social and cultural rights may be expressed differently from country to country or from one instrument to another. The basic rights incuded in this category are:

- Workers' rights;
- The right to social security and social protection;
- Protection of and assistance to the family;
- The right to an adequate standard of living;
- The right to health;
- The right to education;
- Cultural rights.

An historical prespective on economic, social and cultural right.

Poverty, dangerous and often life-threatening work have plagued humans throught history. For many time these realities have been accepted as part of live. When it has been clear that specific people or institutions were the cause of specific condistions, people have frequently resisted or rebelled². This have been induced against a landowner, local lord or other ruler. Sometimes, the resistance has been so great that has became part of the historical record. History is full of stories of peasants resisting taxes imposed on them. For example, in China over the course of centuries peasants resisted taxes they perceived as inequitable or that had became particularly onerous as the result of a short ful in the harvest³.

Increased urbanization and the onset of the industrial revolution in the eighteenth centry caused the social and economic problems faced by large portions if the population to shift towards low wages, dangerous working condistions, for both children and adults. As the decades went by, these situations were increasingly publicized and decried in newspapers and in literature.

The exploitation of labor during decades of the industrial revolution provided the material conditions for the emergence of socialist ideas. Saint Simon, Robert Owen, François Noel, Karl Marx, Friedrich Engels, etc. discussed the evils of capotalism and proposed alternatives to mitigate the ill effects of industrialization⁴. Despite the set back for these revolts within the propertied classes, socialist ideas had begun to have a profound impact in European countries. In, country after country, socialist welfare

¹ Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No.33, United Nations, Geneva, ISSN 1014-5567, December 2008.

² Module of Social Rights at St.Thomas University; 2012

³ Micheal P.Hanagan, Leslie Paga Monch and Wayne Blake; The historical Study of Contentious Politics, Minneapolis University 1998. 15

⁴ Nancy Abelmann, Echoes of the Past, Epics of Dissent; A south social movement; 1996. 27.

measures were introduced. Several countries adopted factory laws, workmen's compensation provisions and health, old age and unemployment insurance for workers. Increasingly, banking and communication were subject to state regulation. Housing and health were brought under the responsibility of the state.

In 1905 were adopted the first Standard International Labor Legislation⁵ and in the Treaty of Versailles governments established an International Labour Organization (ILO).

The ILO was based on⁶:

- lasting universal peace could be established only if it was based upon social justice;
- it was urgent to improve the working conditions of large numbers of people, as injustice, hardship and privation produced such unrest that the peace and harmony of the world were imperiled;
- and the failure by any nation to adopt humane conditions of labor was an obstacle in the way of other nations which desired to improve conditions in their own countries.

Immediately following World War II there was great concern to develop a new, stronger international organization – the United Nations. Government leaders believed that the creation of help prevent the development of Nazi and fascist regimes in the future. The first major initiative for this idea was the creation of Universal Declaration of Human Rights. The Universal Declaration includes a full range of rights, such as civil, political, economic, social and cultural rights⁷.

The next step was about drafting an international rights treaty. The proposed treaty was divided into two parts. International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), which is called International Bill of Human Rights. The ICESCR was to be implemented by Economic and Social Council of UN, which would oversee a reporting procedure⁸. The adoption of the International Bill of Rights did not work but also did not end the work of United Nations in setting standards for human rights.

Other Human Rights Treaties adopted by the UN are: The Genocide Convention in 1948 and International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Economic, Social and Cultural Rights

⁵ Cyril L.R. James. *The Black Jacobins; Toussaint L'Ouverture and the San Domingo Revolution*, New York, 1963.

⁶ Preamble of ILO Constitution and Bartolomei; Op. Cit., 5.

⁷ In articles 22-27 it declares the right to social security, the right to work, the right to rest and leisure, the right to an adequate standard of living, the right to education, the right to freely participate in the cultural life of the community.

⁸ Eric Hobsbawm, *Age of Extremes: The Short Twentieth Century 1914-1991*; Vintage 1996; 498.

(ESCR 1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention on the Rights of the Child (1989) as: Convention Against Torture, Convention on the Rights of the Children, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Convention on the Rights of Persons with Disabilities (2006)⁹.

All this treaties adopted by UN include several provisions dealing specifically with economic, social and cultural rights.

ILO, UNESCO and others organization drafts a number of human rights instruments. The principal regional instruments including economic, social and cultural rights are:

- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), its First Protocol (1952), European Social Charter (1961) and Revised European Social Charter (1996).
- American Convention on Human Rights (1969), and Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (1988).
- African Charter on Human and Peoples' Rights (1981), African Charter on the Rights and Welfare of the Child (1990), and Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (2003).

Judicial Enforcement

The notion of 'justiciability' is widely used in the international human rights discourse, especially in the context of discussions on whether social rights are capable of being enforced through judicial or quasi-judicial procedures. It is worth noting, however, that the word does not appear in some authoritative general dictionaries of the English language, such as the Oxford Advanced Learner's Dictionary¹⁰.

Hence, already the use of the notion of justiciability may imply one's participation in a specific discourse that might be foreign to politicians or other policy-makers even when such persons feel themselves comfortable discussing issues of law, justice and human rights. Human rights advocates speaking for broader justiciability of social rights should therefore show patience in making themselves understood by those who have not picked up their specific jargon.

⁹ Report of the United Nations High Commissioner for Human Rights; E/2011/90*; April 2011

¹⁰ Oxford Advanced Learner's Dictionary of Current English, Fourth Edition (Oxford University Press, 1989). Black's Law Dictionary (Fifth Edition, West Publishing, 1979) includes a short entry for 'justiciability': 'Matter appropriate for court review', as well as a more elaborate one for 'justiciable controversy'. Webster's Encyclopedic Unabridged Dictionary of the English Language (Gramercy Books, 1996), in turn, defines the adjective 'justiciable' somewhat problematically as 'capable of being settled by law or by the action of a court'.

Judicial enforcement is mainly a legal process. Law is mainly created and maintained by the sovereign authority of the country. Judicial enforcement is also a major characteristic of the society.

For the people of the society social right means to live in society with the proper dignity and right to take part in election, right to receive services from the government, right to take part in election and other national activity. Mainly it is nothing but a collective interest of the people living in the society. Only judicial enforcement can take vital step to ensure this right for all the people living in the society. Social right refers to a set of benefits available (or not available) from the state, market, civil society and households, or through a combination of these agencies, to the individual/households to reduce deprivation.

In the beginning economics rights first classified under human right. Then by the passage of time the right to become economically Beneficiary established and as a result we got another right named Economic Right. Mainly economics right deal with right to have a job, right to work, right to established and form any organization. By passage of time right to strike and right social security also become the part of economic right.

The debate as to the justiciability of socio-economic rights continues. Many views-as regards their justiciability or non justiciability thereof- have been put forward by many scholars, with the debate dating back to the time when the two most prominent covenants on rights were adopted. The argument to a larger extent is centred on the weather socio-economic rights are rights ‘properly so called’ under international law or they are just mere privileges extended to individuals by the state subject to the availability of resources.¹¹ This, according to Olademeji, is attributable to the classification of these rights as ‘positive rights’ or ‘second generation rights’ requiring state action for their fulfilment and the classification of civil and political rights as ‘negative rights’ or ‘first generation rights’ requiring a state to avoid interfering with their enjoyment by the individual. This classification, Olademeji rightly asserts, has only managed to send the wrong signals as regards the hierarchical nature of rights.¹²

Decisions of courts in countries from all regions of the world covering all economic, social and cultural rights demonstrate that these rights can be subject to judicial enforcement. Nonetheless, the justifiability of economic, social and cultural rights has traditionally been questioned for a number of reasons. First, economic, social and cultural rights have been seen by some as being too “vaguely worded” to allow judges to justify decisions on whether violations have occurred. While adjudicating such rights

¹¹ Okeowo Ademola Olajamodi ‘Economic, Social and Cultural Rights: rights or privileges’; 2009).

¹² “Inequality and the representation of interests” in Clotly and Schmitt, (eds.) Ireland and the Politics of Change (Addison Wesley Longman Ltd., 1998).

may raise questions of what constitutes, for example, hunger, adequate housing, or a fair wage, judges have already dealt ably with questions of what constitutes torture, a fair trial or arbitrary or unlawful interference with privacy. Filling in the gaps in legislation is a clear function of the judiciary, not only in human rights law but in any area of law¹³.

Second, the realization of economic, social and cultural rights depends heavily on Government policies. Yet, reviewing Government policies to ensure that they are consistent with constitutional principles and obligations under international human rights law is clearly a function of the judiciary. While the role of the judiciary in reviewing Government policy may vary from country to country, policy review is not policymaking. The judiciary is therefore not overstepping its constitutional role by taking decisions on economic, social and cultural rights.

Third, and linked to the previous point, some have questioned whether it is possible for a court to assess the progressive realization of economic, social and cultural rights. Monitoring progressive realization can rely on several mechanisms, including the courts. In South Africa, courts have assessed whether the State is meeting its obligations towards progressive realization by considering whether the steps taken by the Government are reasonable. A failure to take into account the needs of the most vulnerable in, for instance, a housing policy would suggest that the policy would not meet the test of reasonableness.

Judicial enforcement of human rights is fundamental. A right without a remedy raises questions of whether it is in fact a right at all. This is not to say that judicial enforcement is the only, or indeed the best, way of protecting economic, social and cultural rights. However, judicial enforcement has a clear role in developing our understanding of these rights, in affording remedies in cases of clear violations and in providing decisions on test cases which can lead to systematic institutional change to prevent violations of rights in the future.

How Social right can be ensured?

In order to enforce Social Right firstly there should be made a fair and accurate definition of the term “social right”, as the judicial enforcement of these rights intends to provide the same security for everyone in society. This definition should include and ensure the physical integrity and the security of the people. Adopting expansive definitions of civil rights, some of which tend to be widely, if not universally, guaranteed under national law, e.g. rights to life or not be subjected to cruel, inhuman or degrading treatment. This approach has been sanctioned to differing degrees by

¹³ Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No.33, United Nations, Geneva, ISSN 1014-5567, December 2008.

both the UN Human Rights Committee and the European Court of Human Rights. Also, during the implementation of these rights there should not be discrimination against persons because of their origin or social class. Judicial Enforcement of Social right should be done in such a way that there is no discrimination in society and also be in accordance with the basic principles established by the Declaration of Principles on Equality. To achieve this purpose, non-discrimination, it is necessary "Positive action", which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality. Judicial enforcement should ensure that connotations, administrations or other legal executives institute, which have a rightful attentiveness in the recognition of the precise to equality, may engross, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality. But it should be kept in mind that the compliance and implementation of the Social right shall not affect the rights and freedoms of the individuals, because such a thing would not be a benefit for the society.

Judicial Enforcement for social right has to respect some basic principles of democracy as:

- *Implementation of Rule of law*: Rules of law is one of the most important factors of legal system. Ensuring proper rule of law can ensure correct form of social right.
- *Access to justice*: Judicial enforcement must ensure that everyone in the society is getting access to legal system to get justice. Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.
- *Right to get information*: Judicial enforcement should ensure that everyone in the society must know what is going on.
- *Right to participate*: One of the most important social rights is right to participate. Mainly, all the citizen of society possesses that in every national event all the citizen of country can participate and evaluate the quality of the event.
- *Right to education*: Education is vital human right for living in the society. Everyone in the possess the right to be educated. Judicial enforcement must ensure this to implement proper social right in the society.
- *Right to get proper treatment*: All citizen poses the right to treated whenever they got sick. This is one of the most valuable criteria of basic human rights.

The issues that are to the judicial enforcement of the rights in practice include:

- Crafting of legal argument for immediately enforceable rights;
- Judicialisation of the principle of maximum available resources;
- Different remedial options for positive obligations;
- Right to alternative accommodation in cases of forced evictions;
- The disconnect between some ESC rights theory and litigation practice;
- Litigation against non-state actors;
- Implementation of judgments;
- Absence of sufficient resources, training and networking for social rights litigation.

Conclusion

Social rights are fully justiciable in an increasing number of countries, but the number is not large. Reliance on civil and political rights has been frequent in western and common law countries, where courts are open to broad interpretations of the right to life and rights against torture or discrimination. An important component of promoting more expansive interpretations of these rights is to draw on the inter-dependence of all rights and to urge the judiciary to interpret constitutions and legislation so as to be consistent with international human rights law. But there are clear limitations. In the US, some advocates believe there is no significant scope for further advances in the law, particularly in a country which has adamantly refused to recognise social rights in international law.

The incorporation of ESC rights within a domestic legal system is clearly an advantage, as the experiences in Latin America and South Africa demonstrate. However, such incorporation means that local remedies must be exhausted before international remedies can be sought. If the judiciary is conservative and slow to resolve issues domestically, this can mean long delays in achieving a successful decision at the international level.

States should ensure that all international human rights treaties covering social rights achieve universal ratification and incorporate this rights in domestic law provisions in order that they should operate directly and immediately with in the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts.

The states should ensure that domestic human rights institutions have the responsibility and the authority to investigate violations of social rights, to take cases forward to appropriate courts or tribunals and to promote compliance with social rights.

Also the judicial decisions consistent with social rights should be respected, implemented and develop mechanisms to ensure the effective oversight of the process.

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